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Letter dated 3 March 1997 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General

It has come to the attention of my Mission that a letter dated 2 January 1997 has been forwarded to your office by Ms. Biljana Plavsic, in her capacity as the President of Republika Srpska, of Bosnia and Herzegovina.

By the protocol of the United Nations, that official communication, as well as the communication in response, should have come through our office since Republika Srpska is an entity of Bosnia and Herzegovina. We would be most pleased to forward any such communications in the future regardless of their content; and because of the sensitivity of this situation in my country and its dangerous implications, we would request that any such communications be returned for proper routing.

The Legal Counsel has responded to Ms. Plavsic's letter properly, through our office regarding the obligations of all parties, including all political subdivisions within Bosnia and Herzegovina, to comply fully with the International war crimes Tribunal and its orders. We concur with the content of that analysis and would like to emphasize further that full compliance is also mandated by the new Constitution of Bosnia and Herzegovina and the Dayton/Paris Accords as well as international law and the relevant resolutions of the Security Council. We believe it is our responsibility to clarify any potential misunderstanding regarding the international commitments of Bosnia and Herzegovina, including by incorporation those of any political subdivision within Bosnia and Herzegovina. Clearly our Constitution and international law must take precedence.

In view of the interest of the Security Council in this issue and its potential consequences and implications for the peace process, may we request that Ms. Plavsic's letter dated 2 January 1997 and the response of the Legal

Counsel of 21 January 1997 be circulated along with the present letter as an official document of the General Assembly, under item 56, and of the Security Council.

In addition, may we request information regarding any follow-ups by Ms. Plavsic or other officials of Republika Srpska to the response of the Legal Counsel and the many demands by the Security Council for full compliance with the Tribunal and its orders.

(Signed) Muhamed SACIRBEY
Ambassador and Permanent Representative
of Bosnia and Herzegovina
to the United Nations

ANNEX I

Letter dated 2 January 1997 from Ms. Biljana Plavsic addressed to the Secretary-General

I would like, first of all, in my capacity as President of Republika Srpska, to wish you the greatest success in the New Year at your new post. The moderation and balance that graced your work in the former Yugoslavia make us confident that the United Nations will be in good hands, equitably serving the interests of all the world's nations.

Unfortunately, because of the difficult post-war situation, Republika Srpska and Bosnia and Herzegovina will continue to be in the focus of the United Nations. This being the case, I think that it will be most helpful to you if you were informed about the position of Republika Srpska regarding one of the most sensitive issues in the Bosnian political milieu - the issue of war crimes as pursued by the International war crimes Tribunal in The Hague. It is an issue that will need clarification if things are to move forward in Bosnia and Herzegovina.

You will find enclosed herein the view of Republika Srpska which is our contribution to the clarification and, perhaps, the resolution of this highly charged and difficult issue. I shall be pleased to respond to any questions you may have regarding our view or the issue at-large, as well as to receive your comments and opinions.

(Signed) Biljana PLAVSIC
President of Republika Srpska

APPENDIX

Position of Republika Srpska regarding the International Tribunal for the former Yugoslavia

As President of Republika Srpska, I consider it particularly important to acquaint you with my position and the position of Republika Srpska regarding the work of the International Tribunal for the former Yugoslavia in The Hague and, specifically, the issue of the handing over of Dr. Radovan Karadzic and General Ratko Mladic to the Tribunal. This is a matter to which we have given considerable thought since the London Conference, on 4 and 5 December 1996, especially in the light of the high level of attention given to this issue there. It is also a matter on which we have sought legal advice.

The present position of Republika Srpska is that we are unwilling to hand over Dr. Karadzic and General Mladic for trial in The Hague as we believe that any such trial now falls outside the scope of the Tribunal's constitutional framework.

I will now elaborate our position:

(a) As you are of course aware, the United Nations Security Council established the Tribunal as an enforcement measure under Chapter VII of the Charter of the United Nations after finding that violations of international humanitarian law had occurred in the former Yugoslavia which constituted a threat to peace;

(b) In making this finding, the Security Council acted under Article 39 of the Charter, which provides that:

> "The Security Council shall determine the existence of any threat to peace ... and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

(c) We also understand that during the course of the Tadic trial, the Tribunal gave a judgement stating that pursuant to Article 41, the setting up of the Tribunal did fall within the range of steps, not involving the use of armed force, which could be employed for the purpose of restoring and maintaining peace;

(d) We further note that at the time the Security Council resolved to establish the Tribunal, the war in Bosnia and Herzegovina was at its height. This fact is reflected in both resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993. In resolution 808 (1993), the Security Council expressed "Its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia."; and in resolution 827 (1993), in similar terms, it expressed its grave alarm at continuing reports of widespread and flagrant such violations "especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive organized and systematic detention and rape of women and the

continuance of the practice of 'ethnic cleansing', including for the acquisition and the holding of territory". In both resolutions, it is determined "that this situation continues to constitute a threat to international peace and security";

(e) In our view - and this matter has been discussed at the highest political levels in Republika Srpska - the situation referred to in resolutions 808 (1993) and 827 (1993) no longer continues to exist. Whether or not the reports mentioned in resolution 827 (1993) were true and accurate at the time, we do not believe that there are now any reports of mass killings, systematic detention, rape of women or ethnic cleansing. Since the signing of the Dayton Agreement, the situation in Bosnia and Herzegovina has changed fundamentally and peace has been restored. In the opinion of the authorities of Republika Srpska and as far as the Bosnian Serbs are concerned, there is no longer any threat to the peace. To this extent, therefore, the constitutional basis for establishing the Tribunal under Chapter VII, Articles 39 and 41, has disappeared;

(f) This leaves the question of whether the trials of Dr. Karadzic and General Mladic in particular are required for the maintenance of peace in Bosnia and Herzegovina. We think that the answer to this question is clearly in the negative;

(g) In this context, we would reiterate that the authorities of Republika Srpska have no intention or desire to reignite hostilities in Bosnia and Herzegovina. We would add that, from the information available to us, neither have the Muslim and Croat authorities in the Federation any such desire at present and to the extent that they might ever have in mind to recommence hostilities against the Serbs in the future, this would stem from their dissatisfaction with the territorial divisions specified by the Dayton Agreement rather than from whether Dr. Karadzic and General Mladic are handed over for trial in The Hague. Indeed, it is strongly arguable that it is the instability of the Federation which currently presents the biggest threat to continued peace in Bosnia and Herzegovina. If the Muslims and Croats were at some stage in the future to start fighting each other again (as in 1993 when the Tribunal was set up), Dr. Karadzic and General Mladic would bear no responsibility for this; nor would their trial cure the problem;

(h) We would go further. It is our firm belief that if we were to hand over Dr. Karadzic and General Mladic for trial, this would in fact threaten the existing peace. We believe that massive civil and military unrest would result in Republika Srpska which might well prove uncontrollable by the civil authorities and for the consequences of which we would not wish to be held accountable. The people of Republika Srpska, it must be appreciated, do not want Dr. Karadzic and General Mladic to be surrendered and to do so would undermine all the efforts which we have made during the last year with the assistance of the international community to establish peace in Bosnia and Herzegovina. If we were to hand over Dr. Karadzic and General Mladic, the universal feeling among the population in Republika Srpska would be that we as their elected civil representatives had betrayed their trust, provoking an almost certain violent backlash against the Government in Republika Srpska, the Federation and the international community. The chances of fighting restarting would, in our judgement, be high. These would be even higher were any attempt

made to hunt down Dr. Karadzic and General Mladic and forcibly bring them to trial;

(i) For the above reasons we believe that there is no longer any basis within the constitutional framework of Chapter VII of the Charter of the United Nations giving the Tribunal jurisdiction to try Dr. Karadzic and General Mladic;

(j) We would add that another of our concerns, in this context, is that we have been advised that, in law, a determination by the Security Council under Article 39 of the existence of any threat to the peace is not reviewable by a Court including the Tribunal. There is thus, we are disappointed to note, no framework in principle by which the validity of our contentions as outlined above can be tested independently and judicially should they be disputed. We have been referred in the Tadic trial and to the Lockerbie case (Libyan Arab Jamahiriya v. United States of America, I.C.J. Reports 1992, p. 114) decided by the International Court of Justice;

(k) The law appears to be, in a nutshell, that the invocation of Article 39 is not a justiciable issue but rather "one involving considerations of high policy and of a political nature" (Tadic judgement, para. 23). In our view, these are best taken by those politicians on the ground closest to the situation, and we reiterate that our firm conclusion is that the conditions for the applicability of Article 39 no longer exist, nor does "the situation" set out in resolutions 808 (1993) and 827 (1993).

Turning to a wholly different matter, a further reason why we are unwilling to hand over Dr. Karadzic and General Mladic is that we view a trial of these two men as an abuse of the process. Such has been the overwhelming and worldwide level of adverse publicity given to Dr. Karadzic and General Mladic that we are of the opinion that there will be scarcely a single individual outside the former Yugoslavia (other than those with Serb sympathies) whose mind has not already been poisoned into regarding them as "war criminals". We would pose the question to anyone who reads this letter: do you regard Dr. Karadzic and General Mladic as "war criminals"? Even though, publicly, the reader might answer "that is a matter for the Tribunal to decide on the evidence", having consulted widely, we are of the view that, privately, Dr. Karadzic and General Mladic are assumed to be guilty of the allegations against them and that any trial is merely a formality to assuage the conscience of the international community, as well as a means of securing purely political objectives.

It is our opinion that this perception of bias applies equality to the judges of the Tribunal. I will illustrate this point with some examples. In 1995, Professor Cassese, the Tribunal President, called for a "programme of indictments" to "meet the expectations of the Security Council and of the world community at large". This is hardly the language of an independent judge whose duty is not to act as an avenging angel but to do justice though heavens fall.

Again, earlier this year, Professor Cassese urged the postponement of the Bosnian elections until Dr. Karadzic and General Mladic had been arrested and also urged that Serbia should be expelled from the Olympic Games in Atlanta unless it helped to arrest the two men. These remarks suggest a prosecutorial zeal which, again, is wholly inappropriate coming from the president of an

allegedly impartial Tribunal. I believe that his fellow judges share his views and that he speaks for all of them in his public statements.

It was, further, our opinion at the recent London Conference that the political and partial involvement of the Tribunal judges was once again displayed in their overt dissatisfaction with the role allotted to them as observers. A deeper participatory role such as they seemed to crave would have been, in our view, wholly inconsistent with their function - to ensure a fair and impartial trial within accepted legal, procedural and evidential principles.

If, as we think, Dr. Karadzic and General Mladic would not receive a fair trial because of the almost universal assumption of their guilt, a further adverse consequence of this is that the normal burden of proof in a criminal trial, i.e. that it is for the prosecution to prove guilt, not for the defendant to prove his innocence, would in effect be reversed. We do not regard it as right and proper to subject Dr. Karadzic and General Mladic to a trial in these circumstances.

I stress that I have written this letter not out of any desire to be uncooperative with the Tribunal and the international community but because the political leadership of Republika Srpska cannot in all conscience accept that we should be parties to a step which would likely threaten the peace which so many of us have striven so hard to establish in the last year and which would submit Dr. Karadzic and General Mladic to an unfair trial by judges whose primary concern is to meet the expectations of the international community, i.e. to convict them.

Neither Dr. Karadzic nor General Mladic any longer hold any public office, nor is it our intention that they should do so in future. We believe that the continued maintenance of peace in Bosnia and Herzegovina is best served by accepting this state of affairs and by looking forward positively towards rebinding the economy and the industrial infrastructure of the country. The prosecution of Dr. Karadzic and General Mladic would only hinder that process.

(Signed) Biljana PLAVSIC
President of Republika Srpska

ANNEX II

Letter dated 21 January 1997 from the Under-Secretary-General for Legal Affairs, The Legal Counsel, addressed to the Minister for Foreign Affairs of Bosnia and Herzegovina

On 2 January 1997, Mrs. Biljana Plavsić, the President of Republika Srpska, addressed to the Secretary-General a letter in which she set out the position of her Government regarding the surrender of Dr. Karadžić and General Mladić to the International Tribunal to stand trial.

In her letter, Mrs. Plavsić argues that the trial of the two accused, if surrendered to the International Tribunal, would now fall "outside the scope of the Tribunal's constitutional framework". In support of this argument, Mrs. Plavsić advances a variety of reasons having to do with the legality of the establishment of the International Tribunal and its continued existence, the effects of the surrender of the two accused on the maintenance and restoration of peace in the former Yugoslavia, the validity of the Council determination of the existence of a threat to international peace and security and the justiciability of such determination, and the prospects of ensuring a fair trial of the two accused before the International Tribunal.

In view of the fact that Republika Srpska is not a State, the Secretary-General has requested that I convey to you as the Minister for Foreign Affairs of Bosnia and Herzegovina the position of the United Nations with regard to the legal basis for the establishment of the International Tribunal, and the legally binding nature of the obligation to cooperate with the Tribunal and comply with its requests, including, in particular, the obligation to surrender persons accused of having committed crimes falling within the jurisdiction of the Tribunal. Arrangements have been made to deliver a copy of the present letter to Mrs. Plavsić.

As you will recall, the parties to the Dayton Agreement have undertaken to cooperate fully with all entities involved in implementation of the peace settlement, as described in the annexes to the Agreement, or which are otherwise authorized by the United Nations Security Council (article IX of the General Framework Agreement for Peace in Bosnia and Herzegovina). In addition, the Constitution of Bosnia and Herzegovina prescribes that all competent authorities shall cooperate with and provide unrestricted access to the International Tribunal for the former Yugoslavia; in particular, they shall comply with orders issued pursuant to article 29 of the statute of the Tribunal.

The International Tribunal was established by the Security Council in its resolutions 808 (1993) and 827 (1993), under Chapter VII of the Charter of the United Nations. The establishment of the International Tribunal under a Chapter VII resolution entails for all States Members of the United Nations a legally binding and enforceable obligation to comply, and take whatever actions are required to carry out that decision. This obligation is further specified in article 29 of the statute of the International Tribunal which provides that States shall cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian

law, and shall comply without undue delay with any request for assistance issued by the Tribunal, including the surrender or the transfer of the accused to the Tribunal. A request for the surrender or transfer of an accused when emanating from the International Tribunal is, therefore, an enforcement measure taken pursuant to Chapter VII of the Charter of the United Nations.

The legal basis for the establishment of the International Tribunal and its continued existence is challenged by Mrs. Plavsić on the ground that the threat to peace and security which existed at the time of its establishment has ceased to exist, and with it the constitutional basis for the Tribunal itself. This argument runs counter to the principle that the legality of the establishment of the International Tribunal, as an enforcement measure under Chapter VII of the Charter, must be determined in the light of the circumstances prevailing at the time of its establishment, that is May 1993, and not according to the changing circumstances. It also disregards the fact that the determination of the Council was premised on the conviction that a threat to international peace and security exists not only for the duration of the armed conflict, but as long as serious violations of international humanitarian law continue to occur and those responsible for such violations are not brought to trial. Furthermore, the fact that serious violations of international humanitarian law have ceased to exist may be true, but does not affect the temporal jurisdiction of the Tribunal with regard to such violations committed in the context of the armed conflict in the territory of the former Yugoslavia since 1991, as is clearly supported by the Dayton Agreement. In conclusion, the legal basis of the International Tribunal was firmly established at the relevant time and thus cannot be invalidated by the subsequent restoration of peace; its continued validity rests, among others, on its contribution to the maintenance of peace.

Mrs. Plavsić also contends that the trial of the two accused is not required for the maintenance of peace in Bosnia and Herzegovina, and in fact, if pursued, is likely to threaten the peace and result in uncontrolled and massive civil and military unrest. The question of whether or not the surrender and trial of the accused will contribute to the maintenance of peace, or rather threaten its existence, is not a legal question, but one of perception. In establishing the International Tribunal the Security Council was guided by the concept that a real and lasting peace can only be achieved in the former Yugoslavia if justice is done to both those who were victimized and those who perpetrated criminal acts. As stated by the Secretary-General in his report of 3 May 1993 (S/25704), it was the conviction of the Council at the time of the establishment of the International Tribunal that in the particular circumstances of the former Yugoslavia such a measure would contribute to the restoration and maintenance of peace. This conviction is still valid today and will remain so for as long as justice is not done in the former Yugoslavia.

Mrs. Plavsić further argues that since the determination of the Security Council that a threat to international peace and security exists is not justiciable before the International Tribunal or any other jurisdiction, there is no forum before which the validity of the contentions of Republika Srpska can be examined. Indeed, a determination of the Council of the existence of a threat to international peace and security is not justiciable before any jurisdiction. It is for the Security Council to determine whether and what type of enforcement measures under Chapter VII of the Charter are necessary to bring

about peace and security. In the light of the judicial nature of the International Tribunal, it is clear that any such determination would not affect ongoing legal proceedings or the obligation to surrender persons accused of having committed serious violations of international humanitarian law while the armed conflict was still ongoing.

And finally, the International Tribunal, as the representative of the international community as a whole, is a guarantee of an independent, impartial and fair trial for all accused individuals. The statute of the International Tribunal and the Rules of Procedure and Evidence by which it is bound are an expression of the highest standards of human rights and due process of law, and a built-in guarantee for the rights of the accused.

In consideration of the foregoing, it is the position of the United Nations that unconditional cooperation with the International Tribunal is imperative, and that the Republika Srpska should surrender Dr. Karadžić and General Mladić, as well as all other accused within that Entity to the International Tribunal to stand trial.

(Signed) Hans CORELL
Under-Secretary-General for Legal Affairs
The Legal Council